

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

Application of:

Applicant : Keeler, Sr.  
Serial No. : 10/691,480  
Filed : October 21, 2003  
Title : METHOD FOR PACKAGING CRABMEAT  
Docket : 424532-00002  
Examiner : Jyoti Chawla  
Art Unit : 1761

Commissioner for Patents  
Post Office Box 1450  
Alexandria, Virginia 22313-1450

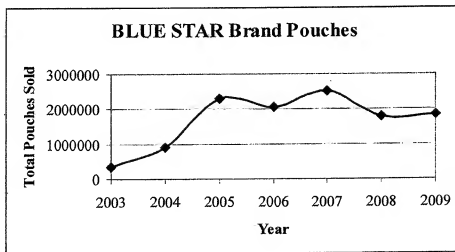
**DECLARATION OF JOHN KEELER, JR. UNDER 37 C.F.R. § 1.132**

I, John Keeler, Jr., declare and state:

1. I am the president of John Keeler & Co., Inc., the assignee of the above-identified patent application (the "Application"). I began working in the crabmeat packaging industry in 1992 and, therefore, have about 18 years of experience in the industry.
2. The pending claims of the Application are directed to a sealed and pasteurized flexible pouch that contains crabmeat and ambient air. The amount of ambient air in the flexible pouch is controlled to provide an ambient air-to-crabmeat ratio of about 13 to 20 percent by volume. This specific ambient air-to-crabmeat ratio provides the sealed, pasteurized flexible pouch with at least two advantages. As a first advantage, the controlled amount of air minimizes swelling of the flexible pouch, and the resulting risk of pouch rupture, during the pasteurization step. As a second advantage, the controlled amount of ambient air inhibits undetectable anaerobic bacterial growth, while permitting spoilage (aerobic) bacterial growth.
3. Thus, due to the claimed ambient air-to-crabmeat ratio, the flexible pouches may be pasteurized with minimized risk of deformation and rupture, while finished pouches

that have been subjected to temperature abuse may be detected by the swelling and odor associated with spoilage bacterial growth.

4. John Keeler & Co., Inc. has been selling pouches of pasteurized crabmeat under the BLUE STAR brand since 2003. The BLUE STAR brand pouches fall within the scope of at least one pending claim of the Application, including claim 10. To my knowledge, no other patents or pending patent applications cover the BLUE STAR brand pouches.
5. The BLUE STAR brand pouches are imported into the United States. To date, the United States Food and Drug Administration has never detained or rejected any imported BLUE STAR brand pouches due to (1) decomposition as a result of a pouch rupture or (2) the presence of botulism (anaerobic bacteria).
6. The BLUE STAR brand pouches have enjoyed commercial success from their debut in 2003 to the present day. Specifically, as shown in the graph below, 356,232 pouches were sold in 2003; 910,027 pouches were sold in 2004; 2,306,278 pouches were sold in 2005; 2,070,383 pouches were sold in 2006; 2,516,229 were sold in 2007; 1,800,327 pouches were sold in 2008; and 1,851,502 pouches were sold in 2009.



7. Therefore, sales of the BLUE STAR brand pouches grew rapidly from their introduction in 2003 through 2007, and sales remained steady but strong in 2008 and 2009, despite the economic recession.
8. The commercial success of the BLUE STAR brand pouches was not the result of heavy advertising or promotion, or a shift in advertising strategy. To the contrary, the advertising budgets versus gross revenue for the BLUE STAR brand pouches were relatively low compared to industry norms. Specifically, the advertising budgets for the BLUE STAR pouches were \$58,753 in 2003; \$53,583 in 2004; \$63,228 in 2005; \$29,398 in 2006; \$21,442 in 2007; \$24,068 in 2008; and \$16,671 in 2009.
9. John Keeler & Co., Inc. primarily sells the BLUE STAR brand pouches to distributors, such as Wal-Mart, which ultimately sell the pouches directly to the end consumer. These distributors are not obligated to purchase the BLUE STAR brand pouches, but rather are free to purchase pasteurized crabmeat products from competitors of John Keeler & Co., Inc. A variety of pasteurized crabmeat products from a variety of different suppliers have been & are currently available on the market.
10. John Keeler & Co., Inc.'s primary competitor in the pasteurized crabmeat industry is S.B. Phillips, LLC, which sells pasteurized crabmeat under the PHILLIPS brand. I estimate that John Keeler & Co., Inc. is currently second to S.B. Phillips, LLC in U.S. market share for pasteurized crabmeat. Therefore, the success of the BLUE STAR brand pouches cannot be attributed to a dominant market position.
11. Prior to commercially launching the BLUE STAR brand pouches, I estimate that John Keeler & Co., Inc. was fifth in U.S. market share for pasteurized crabmeat. I attribute John Keeler & Co., Inc.'s gain in market share to the commercial launch and success of the BLUE STAR brand pouches.
12. To my knowledge, the use of flexible pouches for packaging pasteurized crabmeat was first disclosed in 1997 by Peterson, M. E., G. A. Pelroy, F. T. Poysky, R. N. Paranjpye, F. M. Dong, G. M. Pigott and M. W. Eklund. "Heat-Pasteurization Process

for Inactivation of Nonproteolytic Types of Clostridium botulinum in Picked Dungeness Crabmeat." *Journal of Food Protection* 60(8) (1997): 928-934 (the "Peterson reference"). However, the Peterson reference does not disclose sealing crabmeat and ambient air in a flexible pouch at an ambient air-to-crabmeat ratio of about 13 to 20 percent by volume. Therefore, the flexible pouches disclosed in the Peterson reference lacked the advantages associated with the claimed ambient air-to-crabmeat ratio. Nor did the flexible pouches disclosed in the Peterson reference lead to a commercial product. To my knowledge, the BLUE STAR brand pouches were the first commercially available flexible pouches packed with pasteurized crabmeat.

13. For the foregoing reasons, the commercial success of the BLUE STAR brand pouches is primarily attributable to the advantages associated with the use of flexible pouches having a controlled amount of ambient air to achieve an ambient air-to-crabmeat ratio of 13 to 20 percent by volume, and not to other economic and commercial factors unrelated to the subject matter of the pending claims of the Application.

14. I further declare that all statements made herein of my own knowledge are true and that all statements made on information and belief are believed to be true; and further that these statements were made with the knowledge that willful false statements and the like so made are punishable by fine or imprisonment, or both, under Section 1001 of Title 18 of the United States Code.

FURTHER DECLARANT SAYETH NAUGHT.

Signed: \_\_\_\_\_

John Keeler, Jr.

Date: March 11<sup>th</sup>, 2010

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